85-1621

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM 1985

HON YIP Known as YIP HON,

Petitioner,

—v.—

CLINTON L. PAGANO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Does a defamer acquire absolute immunity in an action for libel and slander by the defamed private individual, when: the defamer voluntarily appeared before a subcommittee of Congress; he was not sworn; he was asked no question; he read his prepared statement which was distributed to the media; he made false defamatory statements with actual malice against the innocent private individual who was not the subject of the subcommittee's study; and the defamatory statements regarding the innocent private individual were not relevant or material to the Congressional study?

2. Is the issue of granting witness immunity to such defamer to be determined by a federal rule of decision or by the law of the separate and individual states when: the Congress provides the hearing forum; it decides the place and circumstances under which the hearing is held; it decides whether a person is invited or subpoenaed; it decides whether the person is sworn or not sworn; it decides whether the person is allowed to make or read his statement; it decides whether such statement is delivered freely; and it decides whether the person is to be questioned and the nature of the questions to be posed?

PARTIES TO THE PROCEEDING

(a) Petitioner Yip Hon is the plaintiff in a civil action for libel and slander in the U. S. District Court for the District of New Jersey.

(b) Respondent Pagano is the defendant. He is the Superintendent of the New Jersey State Police. He moved to dismiss the complaint claiming absolute immunity because his statements were made to a subcommittee of the U. S. Congress.

(c) The Leadership Group of the House of Representatives Committee on the Judiciary appeared in the District Court as *amicus curiae* in support of Pagano's motion to dismiss the complaint. In the Court of Appeals the Congressional Group again joined Pagano in support of his position that absolute immunity had been afforded him.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment entered January 16, 1986 by the United States Court of Appeals for the Third Circuit affirming a judgment of the United States District Court for the District of New Jersey.

The Court of Appeals has held that a volunteer who is permitted to read a defamatory statement before a subcommittee of Congress has absolute immunity against an action for libel and slander simply because his defamatory statements regarding plaintiff were made to a subcommittee of the Congress. This is so even though defendant's statements were made with actual malice and under circumstances lacking the safeguards attendant upon judicial proceedings such as being sworn and being asked specific questions.

OPINIONS BELOW

The Court of Appeals issued a judgment order on January 16, 1986, reported in 782 F.2d 1033. It is set forth in its entirety as Appendix A. It affirmed the judgment of the District Court for the reasons stated in the District Court's opinion by Hon. Mitchell H. Cohen.

The District Court opinion, dated April 26, 1985, is reported in 606 F.Supp. 1566. It is set forth as Appendix B.

Petitioner's petition to the Court of Appeals for rehearing was denied on February 5, 1986. The order of denial is set forth as Appendix C.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The judgment of the Court of Appeals was entered January 16, 1986. Petitioner's timely motion for a rehearing was denied by order entered February 5, 1986.

STATEMENT OF THE CASE

Respondent Pagano is the Superintendent of the New Jersey police. At his request, the "Subcommittee on Crime of the Committee on the Judiciary of the House of Representatives" invited him to appear at its hearing regarding the use of casinos to launder proceeds of drug trafficking and organized crime.

Pagano prepared 50 copies of his written statement, of which a number were made available to the media. In it, he falsely cited petitioner Yip Hon as one of twelve specific examples of career criminals who were washing monies through the casinos of Atlantic City. Again, referring to Yip Hon, Pagano added:

> "Yip Hon, an international narcotics smuggler from Hong Kong, China, deposited $110,000.00 in cash at the

> Golden Nugget Casino and $280,000.00 at Caesar's Casino."

At the hearing, Pagano was not placed under oath. He was asked no question about Yip Hon. The Chairman of the subcommittee simply stated: "Colonel Pagano, welcome."

Thereupon, in the presence of representatives of the media to whom Pagano's written statement had been distributed, Pagano orally repeated that Yip Hon is one of "the specific examples of career criminals who are 'washing' monies through the casinos." Pagano also said:

> "An individual by the name of Yip Hon, an alleged international narcotics smuggler from Hong Kong, deposited $110,000.00 in cash at Golden Nugget and $280,000 in cash at Caesar's."

These statements are false, malicious and defamatory in every detail, except that Yip Hon is from Hong Kong. He is not a criminal. He is not a smuggler of narcotics. He has never been arrested. He has never been accused or charged with the commission of any crime. He did not deposit $110,000 in cash at the Golden Nugget Casino. He did not deposit $280,000 in cash at Caesar's Casino.

Yip Hon is 79 years old. His business is international in scope. Much is government regulated. His business in the United States and elsewhere is, for the most part, family owned and operated. His sons have management roles second only to him. His frequent visits here are to confer regarding his property, business, and prospective ventures, and to be with his children and grandchildren who are U.S. citizens.

Upon publication of Pagano's defamatory statements, Yip Hon sought to minimize their effect. He visited the offices of the United States Drug Enforcement Agency ("D.E.A.") in Hong Kong. He exhibited the published statements of Pagano about him. At Yip Hon's request, the D.E.A. in Hong Kong made an investigation of Yip Hon. They found no basis for

Pagano's statements. The D.E.A. in Washington also was contacted and the special agents to whom the matter was assigned came to the same conclusion. The two casinos mentioned in Pagano's statements submitted documentary proof that Yip Hon had not deposited any cash as had been stated by Pagano. (Record page 50)

Yip Hon then wrote to Pagano setting forth in detail all the facts about himself, his age, his life, his business and family. He included the reports of the D.E.A. and the casinos. He repeated that he is not a criminal, had never been arrested or accused of any criminal activity, had no involvement with narcotics, and that the mere thought of narcotics was obnoxious to him. He also stated that he did not deposit any cash at the casinos. Yip Hon demonstrated by documentary proof that each of the statements made by Pagano was false, except that he was from Hong Kong. (Record pages 51-52)

Yip Hon requested that Pagano appear again before the subcommittee at its adjourned hearing to correct the statements and make retractions which would be available to the media for publication. So that there could be no question of Yip Hon's good faith in seeking to minimize the effect of the defamatory statements, he offered a general release to Pagano and his aides if the corrections and retractions were made. Pagano refused.

All Pagano did was write a letter to the subcommittee requesting that it delete from the transcript all reference to Yip Hon. This was not the correction and retraction which Yip Hon sought.

Yip Hon wrote to Pagano and communicated via telephone to Pagano's counsel, the Assistant Attorney General of New Jersey, that to be of any effect, the corrections and retractions had to be presented to the subcommittee at its adjourned hearing where the media would be present.

Pagano was no ordinary person without facilities or sources to obtain or verify information. Before issuing his prepared

written statement to the media and making his oral presentation to the subcommittee in the presence of the media, Pagano, as head of the New Jersey police, had resources and facilities readily available to check the accuracy of his statements. Additionally, prior to his appointment as police superintendent, he had been Assistant Supervisor of the Criminal Investigative Section of New Jersey's police. He had been a confidential investigative aide to New Jersey's Attorney General. He had been in command of the State's Narcotics Bureau. With such resources, facilities and experience, Pagano knew Yip Hon was not a criminal, not a smuggler of narcotics and had not deposited any cash at either of the two casinos.

The malicious character of Pagano's statements is set forth in the complaint and in Yip Hon's detailed factual affidavit. Each of the statements regarding Yip Hon was made by Pagano recklessly, carelessly and without regard for the truth. They were made with actual malice intending to defame Yip Hon and injure him in his good name and reputation. Pagano did not dispute those facts in his moving affidavit. Instead, he claimed absolute immunity as a complete defense. His motion to dismiss was based on such defense.*

Pagano's malice and intention to injure Yip Hon also were demonstrated by the fact that there was enough time between Yip Hon's requests and the adjourned date of the hearing for Pagano to arrange for his public appearance at the subcommittee's adjourned hearing to deliver his correction and retraction. Pagano did nothing. Instead, he waited for approximately three months until after the subcommittee had concluded its adjourned hearing and closed its inquiry. He also waited until two months after this action had been commenced against him. He then wrote to the subcommittee stating that he had "intended" by his letter written after the first hearing to "retract [his] remarks concerning [Yip] Hon". Hence, this too, consti-

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* In the Courts below, Pagano stated he was not relying on any qualified privilege, apparently because he was aware malice would defeat such privilege.

tuted his acknowledgment of the falsity of his statements regarding Yip Hon. (Record page 54)

Pagano's motion to dismiss also served to avoid his being deposed pursuant to notice previously served. We respectfully submit that such deposition would have developed the additional detailed facts and circumstances which would have contributed to Yip Hon's proof regarding Pagano's malice.

Furthermore, both the complaint and Yip Hon's uncontroverted affidavit in opposition to Pagano's motion show that Pagano's statements regarding Yip Hon were not pertinent, material or relevant to the hearing. Each statement regarding Yip Hon was made by Pagano not in response to any specific question addressed to him by the subcommittee. The statements were unsolicited.

The Congressional subcommittee acknowledged that Pagano's statements regarding Yip Hon were not relevant by deleting all references to Yip Hon from the record of its proceedings which it printed and published 14 months after Pagano had issued his defamations. Pagano himself acknowledged that his statements regarding Yip Hon were not relevant when he asked the subcommittee, three months after his appearance, to edit the transcript and delete all references to Yip Hon.

PROCEEDINGS BELOW

Jurisdiction of the United States District Court was invoked because of diversity of citizenship (28 U.S.C. § 1332). Upon joinder of issue, respondent Pagano moved to dismiss. This stayed the taking of Pagano's deposition. The Congressional application to appear as *amicus curiae* came on to be heard simultaneously with the motion to dismiss.

The District Court opinion and order granted the Congressional application to appear as *amicus* and granted Pagano's motion to dismiss the complaint. Petitioner Yip Hon appealed only from so much of the order which dismissed his complaint.

He did not appeal from the part granting leave to the Congressional group to appear as *amicus*.

In its opinion, the District Court held that respondent Pagano was shielded by absolute privilege because his statements were made to a Congressional subcommittee.

The Court of Appeals, without having heard argument, affirmed, for the reasons stated in the opinion of the District Court. It refused a rehearing.

The District Court's opinion and order were made April 26, 1985. This was two months before this Court's decision in *McDonald* v. *Smith*, 472 U.S. ____, 105 S.Ct. 2787 (June 19, 1985). However, the Court of Appeals did have the benefit of this Court's opinion in *McDonald* when the appeal was submitted to it.

Nevertheless, both the Court of Appeals and the District Court disregarded completely the allegations and proof of actual malice. Each apparently considered the elements of malice of no significance because the defamatory statements were made to a subcommittee of the Congress.

REASONS FOR GRANTING THE WRIT

There are two reasons why a writ of certiorari should issue to review the decision of the Court of Appeals:

1. If the District Court decision, as affirmed by the Court of Appeals, is left standing, Congress will have arrogated to itself the power to create a forum, without safeguards, at which unsworn persons who voluntarily appear, may, with absolute immunity, falsely and maliciously defame innocent private individuals.

2. If the District Court decision, as affirmed by the Court of Appeals, is left standing, then the issue of Congressional witness immunity will be determined under separate individual state law principles although unique federal interests are involved. Those federal interests require the protection of a

federal rule of decision. This is because the Congress provides the Congressional forum. It provides the place and circumstances under which its hearings are to be held. It decides who is invited or subpoenaed to attend. It decides whether such persons are to be sworn. It decides whether they are to be questioned. It decides the substance of the questions. It decides whether each person attending is allowed to make or read his statement. It decides whether such statement is to be delivered freely. And it decides whether such hearing is to be open to the public and attended by the media.

I

Pagano Should Not Have Received Absolute Immunity From Liability for Libel and Slander Simply Because His Statements Were Made to a Subcommittee of the Congress. His Defamatory Statements Were Made at the Congressional Subcommittee's Hearing or Meeting which Lacked the Safeguards of a Judicial Proceeding. Pagano Appeared Voluntarily. He Was Not Sworn. He Was Asked No Question Regarding Yip Hon. His Unsolicited Remarks Regarding Yip Hon Were Not Relevant to the Congressional Study.

The February 10, 1984 hearing or meeting of the Congressional subcommittee in Atlantic City was "elevated" to that of a judicial proceeding by the Court of Appeals when it affirmed the judgment of the District Court for the reasons stated by it. The District Court had made short shrift of the safeguards attendant upon a judicial proceeding. It held that a Congressional subcommittee hearing constituted a legislative proceeding within the framework of § 590A of the Restatement (Second) of Torts entitled "Witnesses in Legislative Proceedings." The section reads:

> "A witness is absolutely privileged to publish defamatory matter as part of a legislative proceeding in which he is testifying or in communications preliminary to the proceeding, if the matter has some relation to the proceeding."

Section 590A is not applicable. It was misconstrued by the District Court. Pagano was not "testifying". Pagano was not a "witness".

To "testify" is "to make a solemn declaration, under oath or affirmation * * * ". "Testimony" is "Evidence given by a competent witness under oath or affirmation * * *" *Black's Law Dictionary* 1323 & 1324 (5th ed. 1979). To "testify" is "To give one's testimony under oath as a witness" *Ballentine's Law Dictionary* 1271 (3rd ed. 1969). A "witness" is "A person whose declaration under oath (or affirmation) is received as evidence for any purpose * * *" *Black's* 1438.

The principle of granting judicial witness immunity is based on status. It is the status as a witness in a judicial proceeding or a proceeding which is conducted in the manner similar to a judicial proceeding, such as an administrative hearing, which bestows the immunity, *Rainier's Dairies* v. *Raritan Valley Farms*, 117 A.2d 889, 19 N.J. 552 (1955). In *Rainier's Dairies*, the court specifically found that "the administrative proceeding was actually conducted in a manner and with safeguards similar to a judicial proceeding * * * ." *Id.* 117 A.2d at 894.*

The burden of showing privileged status is upon the person asserting the privilege. Here, Pagano was not a witness. He was not sworn. His statements were not made under oath or affirmation. He did not testify. He came to that "hearing" to "petition" the Crime Subcommittee and to support the proposed legislation.

Pagano's status was no different than that of McDonald in *McDonald* v. *Smith*, 472 U.S. ____, 105 S.Ct. 2787 (1985).

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* *See also Elder* v. *Holland*, 155 S.E.2d 369, 208 Va. 15 (1967) [absolute privilege not extended to police captain testifying at a Department of State Police hearing]; and *Engelmohr* v. *Bache*, 401 P.2d 346, 66 Wash.2d 103 (1965), petition for cert. dismissed, 382 U.S. 950 [absolute privilege not applicable to words spoken at a hearing conducted by the "Special Study of Securities Markets" appointed by the S.E.C. which was then to report back to Congress with results and recommendations for legislation]. In both cases the courts noted the absence of judicial safeguards.

There, McDonald's letters to the President and Congressmen contained false and defamatory statements. McDonald claimed absolute immunity under the petition clause. Because his defamatory statements were alleged to have been made with malice, McDonald's claim to absolute immunity was defeated. In the case at bar, Pagano's malice, too, deprived him of the immunity he would have had under the petition clause. In the Courts below, Pagano stated that he was not relying on any qualified privilege. He recognized that malice defeats such privilege.

By "elevating" the Congressional subcommittee hearing or meeting to that of a judicial proceeding, the Courts below disregarded the safeguards which prevent abuse and which are present at judicial proceedings. By no stretch of the imagination can it be said that the February 10, 1984 Crime Committee hearing was conducted in a manner similar to a judicial proceeding.

The District Court summarily disposed of the requirement of the oath or affirmation by stating:

> "* * * any abuse of the immunity by unsworn witnesses is likely to be tempered by their sincere desire to be recognized as knowledgeable and credible in their testimony. Such legitimate desires strongly support the allowance of the privilege despite the lack of an oath." (Appendix B-11)

The District Court was in error. It was not being realistic.

One who uses a Congressional forum to defame falsely an innocent private individual with malice is not tempered by any sincere desire to be recognized as knowledgeable or credible. It is the oath which provides the safeguard against abuse. It is the oath which provides the safeguards of control and supervision. It provides sanctions necessary for control and supervision such as prosecution for perjury. The "desire" to be recognized as knowledgeable and credible is no substitute for the oath.

So, too, the District Court misconstrued the voluntary appearance of a witness as against a witness subpoenaed or compelled to attend, and the unsolicited voluntary statement as against the statement made in response to a specific question. When a person appears voluntarily and is allowed to make his statement without being asked any question, the safeguard against abuse is lacking. A person compelled to testify will do so in response to specific questions. The specific question provides a safeguard against abuse.

The failure to ask Pagano questions is a safeguard which was lacking. It led to his making the unsolicited statement about Yip Hon which would not have been made had he been asked specific questions. It led to his defamatory statement about Yip Hon which was not relevant to the inquiry.

If the February 10, 1984 hearing before the Congressional subcommittee had been conducted with the safeguards of a judicial proceeding, the defamatory statement regarding Yip Hon would never have been made because Pagano would not have been asked any question about Yip Hon and Pagano would have been under oath.

The rule of law dealing with statements to legislative committees was enunciated in the early case of *Wright et al.* v. *Lathrop*, 21 N.E. 963, 149 Mass. 385 (1889). There the defendant had appeared before a committee of the Massachusetts Legislature to recommend the passage of a bill making tenants at will liable for damages from fire caused by their negligence. Defendant urged that the law be changed, stating that he believed that plaintiffs willfully burned his building.

Plaintiffs brought an action in tort for slander because of defendant's statement concerning the burning of his building. The answer set forth "that the statement was a privileged communication made to a committee of the legislature upon a subject then under consideration by the committee * * *." *Id.* 21 N.E. at 965.

There, as in the case at bar, the person before the committee was not sworn. His defamatory statement was not in response to any question of the legislative committee. There, the court determined that absolute privilege did not apply and that factual issues were involved and should be decided by a jury. The Massachusetts court, after its analysis of a number of English and American decisions, stated:

> "It is not the duty of the witness to decide for himself whether the questions asked him under the direction of the tribunal are pertinent or not. As the witness is sworn to tell the whole truth relating to the matter concerning which his testimony is taken, he ought also to be absolutely protected in testifying to any matter which is relevant to the inquiry, or which he reasonably believes to be relevant to it. But a witness ought not to be permitted with impunity to volunteer defamatory statements which are irrelevant to the matter of inquiry and which he does not believe to be relevant." *Id.* 21 N.E. at 965

> "* * * such communications are privileged if they are made in good faith, and without malice. The privilege is conditional, not absolute. If the defendant stated before the committee that the plaintiff willfully burned his building, and this statement was made not in answer to any question put him by the committee while having under consideration the order referred to them, we think it was a question for the jury whether the defendant was acting in good faith and without malice; * * * ." *Id.* 21 N.E. at 966

It was not for Pagano to determine what is relevant to the subcommittee hearing. As in *Wright* v. *Lathrop*, Pagano was asked no question regarding Yip Hon. What the District Court did was to make a "finding" of "relevancy" based on Pagano's wrongfully including Yip Hon's name with eleven other persons who are career criminals.

This was error. Yip Hon is not a criminal. He is not a smuggler of narcotics. He did not deposit cash at any casino as

erroneously stated by the District Court. Contrary to what the District Court stated, Pagano admitted that his references to Yip Hon were not "relevant" when Pagano asked the subcommittee to delete the references from the transcript.

The District Court stated that Pagano "sought to have all reference to plaintiff [Yip Hon] stricken from the record in response to plaintiff's request and in an attempt to obtain a general release from liability." (Appendix B-13)

The District Court was in error. Yip Hon did not request that all reference to him be stricken from the record. What he requested was that Pagano again appear before the subcommittee at its adjourned hearing and in the presence of the media correct or retract his statements regarding Yip Hon. This Pagano refused.

If, as the District Court erroneously stated, Pagano's request was "an attempt to obtain a general release from liability", then it was an ill-conceived attempt. It is indicative of Pagano's bad faith. His defamatory remarks had been made publicly to the subcommittee and the media. His private request by letter to the subcommittee to delete reference to Yip Hon would not be made known to those who heard the defamatory remarks. That private request was neither a correction nor a retraction.

Surely, the subcommittee of the Congress was not concerned with Pagano's obtaining a general release from Yip Hon when it subsequently struck from the printed transcript of the record all references to Yip Hon. It is that subcommittee which refused Yip Hon's request to appear at its adjourned hearing to refute and correct the statements made by Pagano about him. Such refusal and actual striking from the present transcript could only be based on the lack of relevancy and materiality. However, despite such lack of relevancy and the absence of good faith, the District Court wrote:

> "The central principle of the privilege is to *tolerate* defamatory remarks in order to further interests which are, on balance, of greater importance to the overall

> legislative, or judicial, design than are those interests which would favor the imposition of liability.
>
> "We conclude that Col. Pagano's statement pertaining to Hon Yip related to the subject matter of the legislative proceedings * * * ." [emphasis in the original] (Appendix B-14)

That Pagano's statements were not relevant has been demonstrated and acknowledged by the subcommittee and by Pagano. The District Court assumed that the material was relevant (Appendix B-11). But can a non-fact be relevant to an inquiry? Let us suppose that none of the twelve people named had engaged in laundering; that the charge that they were, was a figment of the imagination. Would this non-fact have been "related" to the inquiry? Is it different when the non-fact relates to one person only?

The District Court did not say how Pagano's maliciously false defamations of Yip Hon furthered the interests of the Congressional subcommittee. The District Court did not state how Pagano's defamations were of any "importance to the overall legislative * * * design." In fact, the defamations were of no value.

Justice Brennan, in his concurring opinion in *McDonald* v. *Smith* quoting from *Garrison* v. *Louisiana*, 379 U.S. 64 at 75, wrote:

> "Calculated falsehood falls into that class of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality * * *.' "

In the Court of Appeals, the Congressional group stated: "Committees of the House of Representatives hold more than 3,000 hearings a year", "The overwhelming majority of Congressional witnesses appear voluntarily and most deliver such

[previously prepared unsworn] statements." It argued that few witnesses could testify without being subject to defamation liability if the absence of the oath and other factors were to defeat the absolute privilege.

Indeed, if few witnesses can testify without being subject to defamation liability, then the value of their statements to the Congressional committee is extremely questionable.

Surely our judicial system has endured and functioned through hearings which far outnumber Congressional hearings. Judicial proceedings have not been inhibited by the presence of the oath and interrogation which tend to eliminate the false and irrelevant unsolicited statement. A trial supervised by a judge is faced with no greater burden than a Congressional committee with its adequate personnel, including counsel.

The Congressional group also contended that it was for the Crime subcommittee to decide whether law enforcement officials had to be subpoenaed or sworn. We agree. Although the Congress does have such right to decide whether a law enforcement official or any person, invited or subpoenaed to attend, is to be allowed to deliver an unsworn statement without interrogation, the question is whether the Congress may grant such person absolute immunity against liability for defamation damages. Stated simply, the issue is:

> May Congress arrogate unto itself the power to create a forum where a person may attend and with absolute immunity defame an innocent private individual with malice, under circumstances where his statement was not made under oath, not in response to any question, made voluntarily and not relevant to the Congressional inquiry?

The combination of having the witness sworn and having him respond to specific questions which are relevant to the inquiry, provides safeguards of control and supervision present in judicial proceedings. The oath also provides sanctions necessary for control and supervision. These safeguards against abuse were lacking at the February 10, 1984 hearing.

Although New Jersey and Federal common law provide essentially the same privilege, *Burke* v. *Deiner*, 479 A.2d 393, 97 N.J. 465 (1984), nevertheless, if the District Court decision as affirmed by the Court of Appeals is left standing, Congress will have arrogated to itself the power to create a forum, without safeguards, at which unsworn persons may, with absolute immunity, falsely and maliciously defame innocent private individuals.

II

The Need For a Federal Rule Of Decision Is Required to Protect Uniquely Federal Interests Which Are Created by the Congress. The Issue of Absolute Immunity To Be Accorded a Participant at Such Congressional Inquiry Is Not To Be Left for Determination Under State Law Principles.

Preliminary to its discussion of witness immunity, the District Court stated that the issue of witness immunity is not to be determined by a Federal rule of decision because the protection of uniquely federal interests is not involved. The District Court was in error. The Court of Appeals, in affirming, also was in error.

The Federal interests in the case at bar were provided by the Congress. The inquiry of its subcommittee related to the need for Federal legislation to deal with the use of casinos to launder the proceeds of activities of drug traffickers and organized crime. It is the Congressional subcommittee which determined that the hearings be opened to the public and attended by the media. It is the Congressional subcommittee which decided who was to be invited to attend. It also decided, at Pagano's request, to invite Pagano instead of his subordinate, Dintino. It decided to hold the first meeting in Atlantic City and not to administer the oath to the persons who were to deliver their statements. Their statements were made available to the public through the media. Among the statements distributed was the statement of Pagano. The chairman of the

subcommittee welcomed Pagano, then Pagano read his prepared statement. Pagano was asked no question. He had not been sworn. The media used the contents of the oral and prepared statements for publication to the general public.

The subcommittee had it within its power to have Pagano sworn. It had it within its power to conduct its inquiry by asking him specific questions. It chose not to do either. No question was asked of Pagano regarding Yip Hon.

It is the conduct of the Congressional subcommittee hearing which is the Federal interest from which the issue of absolute immunity arises. It requires a Federal rule of decision for determination. It does not require determination under the applicable principles of state law where lack of uniformity is the norm.

Nevertheless, the Congressional group continued its support of Pagano "because New Jersey and federal common law provide essentially the same privilege." This is a shortsighted view. It leads to lack of uniformity where uniquely Federal interests are involved.

CONCLUSION

The petition for a writ of certiorari should be granted to decide:

(a) Whether a subcommittee of the Congress may arrogate to itself the power to create a forum at which an unsworn person who voluntarily appears may falsely and maliciously defame an innocent private individual and thus provide the defamer with the shield of absolute immunity?

(b) Whether the issue of witness immunity is to be determined by a federal rule of decision when: It is the Congress which provides the Congressional forum. It is the Congress which decides the place and circumstances under which its hearing is to be held. It is the Congress which decides the person who is to be invited or subpoenaed to attend. It is the

Congress which decides whether he is to be sworn. It is the Congress which decides whether he is to be questioned and the nature of the questions to be put. It is the Congress which decides whether he is to be allowed to make or read his statement. And it is the Congress which decides whether such statement is to be delivered freely in public or privately?

Dated: New York, New York
April 2, 1986

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 85-5347

HON YIP, known as YIP HON

—VS.—

CLINTON L. PAGANO

HON YIP,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
OF NEW JERSEY - CAMDEN
CIVIL ACTION No. 84-3066

DISTRICT JUDGE: HON. MITCHELL H. COHEN

Submitted Pursuant to Third Circuit Rule 12(6)
January 8, 1986

Before:

ADAMS, SLOVITER and MANSMANN,
Circuit Judges.

JUDGMENT ORDER

After consideration of all contentions raised by appellant, and for the reasons set forth in the district court opinion by the Honorable Mitchell H. Cohen, *Yip v. Pagano*, 606 F. Supp. 1566 (D. N.J. 1985); it is

ADJUDGED and ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

BY THE COURT:

/s/ CAROL LOS MANSMANN
Carol Los Mansmann
Circuit Judge

ATTEST:

/s/ SALLY MRVOS
Sally Mrvos
Clerk

DATED: January 16, 1986

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civ. A. No. 84-3066

April 26, 1985

Hon YIP a/k/a Yip Hon, *Plaintiff*,

—v.—

Clinton L. PAGANO, *Defendant*.

Samuel M. Sprafkin, David C. Sprafkin, New York City, and Gomes & Gould by Harris Gould, Newark, N.J., for plaintiff.

Irvin I. Kimmelman, Atty. Gen. of New Jersey by Eugene J. Sullivan, Asst. Atty. Gen. of New Jersey, Nancy B. Stiles, Deputy Atty. Gen. of New Jersey (Argued), Trenton, N.J., for defendant.

Steven R. Ross, Gen. Counsel to the Clerk of the U.S. House of Representatives by Charles Tiefer, Deputy Gen. Counsel to the Clerk (Argued), Michael L. Murray, Asst. Counsel to the Clerk of the U.S. House of Representatives, Washington, D.C., for amicus curiae the Leadership Group of the House Committee on the Judiciary.

COHEN, *Senior District Judge:*

This defamation action is presently before the Court on the motion of defendant, Colonel Clinton L. Pagano, Superintendent of New Jersey State Police, for summary judgment pursuant to Fed.R.Civ.P. 56(b). Prior to ruling on this motion, however, we must consider the requests put forth by the Leadership Group of the United States House of Representatives Committee on the Judiciary (the Leadership Group)[1] to appear as *amicus curiae* in this matter and to have the Court waive Local Rule 4(C) which would require that out of state attorneys be admitted *pro hac vice* and appear with local counsel. United States District Court, District of New Jersey General Rule 4(C).

I

This action arises from remarks made by defendant, Colonel Pagano, in his opening statement before the House Subcommittee on Crime (Subcommittee) which, on February 10, 1984, conducted a hearing in Atlantic City, New Jersey concerning the alleged use of casinos to launder profits realized by alleged organized crime members and drug traffickers. In his opening remarks defendant stated that Hon Yip, plaintiff herein, was an alleged international drug smuggler who had laundered nearly $400,000 in two Atlantic City casinos.[2]

---

1. The Leadership Group consists of the Honorable Peter W. Rodino, Jr., of New Jersey, and the Honorable Hamilton Fish, of New York, respectively chairman and ranking minority member of the Committee and the Honorable William J. Hughes, of New Jersey, chairman of the Subcommittee on Crime of the House Committee on the Judiciary.

2. In a prepared statement submitted to the Subcommittee prior to the hearing, defendant wrote:

> "Yip Hon, an international narcotics smuggler from Hong Kong, China, deposited $110,000.00 in cash at the Golden Nugget Casino and $280,000.00 at Caesar's Casino." (Plaintiff's complaint ¶ 5).

At the hearing itself, defendant made the same statement except that he inserted the word "alleged" prior to "international narcotics smuggler." (Plaintiff's complaint ¶ 7).

On July 26, 1984 plaintiff instituted the instant action in which he seeks $70,000,000.00 in compensatory damages and $10,000,000.00 in punitive damages. As the sole basis for the present motion, defendant maintains that statements made before a legislative body are absolutely privileged provided they regard a subject properly within that body's jurisdiction and have some relation to legitimate legislative business. Due to the potential impact that our decision may have on the principles governing the testimony of Congressional witnesses, the Leadership Group seeks the Court's permission to appear as *amicus curiae*. Defendant has submitted a letter brief in support of this request;[3] plaintiff has submitted a brief in opposition.

II

At the trial level, where issues of fact as well as law predominate, the aid of *amicus curiae* may be less appropriate than at the appellate level where such participation has become standard procedure. Accordingly, "the privilege to be heard as an *amicus curiae* rests within the discretion of the court [which] may grant or refuse leave, according as it deems the proffered information timely and useful or otherwise." 3A C.J.S. Amicus Curiae § 3 (1973). *See Leigh v. Engle,* 535 F.Supp. 418 (N.D.Ill.E.D.1982). *Leigh* involved a request by the Secretary of Labor to participate in that matter as *amicus curiae*. There,

3. In support of his summary judgment motion defendant initially submitted the affidavit of Hayden Gregory, Esquire. Mr. Gregory, who is counsel to the Subcommittee, provided information in his affidavit relative to the circumstances surrounding defendant's testimony. In an attempt to depose Gregory, plaintiff obtained a subpoena which Gregory moved to quash in the district court for the District of Columbia. In order to resolve the dispute over that deposition the parties here have agreed to the withdrawal of the Gregory affidavit. Plaintiff contends, however, that the Leadership Group is attempting to replace the Gregory affidavit with its brief. On the other hand, the Leadership Group maintains that the issue of defendant's desired immunity can be resolved without the Gregory affidavit by reliance only upon the public information it has provided. We note here that our decision on the merits of this motion in no way rests on the Gregory affidavit.

the court denied the request for two reasons. First, it noted that the Secretary's position was more accurately termed a friend of the plaintiff than a friend of the court. Second, the court expressed its legitimate concern that a grant of the Secretary's request after more than three years of proceedings, of which he had been aware, would cause delay in further consideration of the matter. Such is not the case here. Plaintiff filed his action in July of 1984, less than seven months prior to the Leadership Group's request. With the exception of the summary judgment motion presently before us, there have been very few proceedings to date. In opposing the Leadership Group's motion, plaintiff relies on *Casey v. Male,* 63 N.J.Super. 255, 164 A.2d 374 (Essex County Ct.1960), wherein the Publishers Bureau of New Jersey and the New Jersey Press Association were denied permission to appear as *amici* because they sought to assume an advocatory rather than advisory role. "Where a petitioner's attitude toward the litigation is patently partisan, he should not be allowed to appear as *amicus curiae.*" *Id.* at 259, 164 A.2d 374.

Casey, however, is readily distinguishable from the case at bar. In *Casey,* the groups seeking to appear as *amici* represented business interests which would be ultimately and directly affected by the court's ruling on the substantive matter before it. Here, however, the Leadership Group will only be indirectly affected by our ruling on the substantive issue of witness immunity. The Leadership Group's interest in this matter is nonetheless compelling due to the need of the legislative branch of government to readily obtain information in aid of its law making function. Any ruling by this Court limiting the scope of this immunity will affect the ability of Congress to obtain adequate information in an efficient manner. For example, were we to conclude that only statements made by a witness who had been subpoenaed to testify would be within the immunity, Congress would likely be forced to subpoena all of its witnesses, a cumbersome procedure, or rely on information from fewer witnesses. As a result, the goal of formulating legislation on a well informed basis would be impaired.

The brief proffered by the Leadership Group, although in parts adversarial, nonetheless presents a helpful analysis of the law of legislative immunities and of the functions and procedures of Congressional committees. We do not find that those aspects of the Leadership Group's brief which advocate defendant's position so taint it as to outweigh its usefulness. *Cf. Keenan v. Board of Chosen Freeholders of Essex Cty.*, 106 N.J.Super. 312, 255 A.2d 786 (App.Div.1969) (expression of opinion as to appropriate outcome by *amicus curiae* is proper). Therefore, we shall allow the Leadership Group to appear as *amicus curiae* on defendant's motion for summary judgment. As *amicus curiae* is counsel to the United States House of Representatives, a coordinate branch of the government, we shall waive the requirements of Local Rule 4(C). *See* United States District Court, District of New Jersey General Rule 4(F) (allowing appearance by attorneys for the United States).

III

Fed.R.Civ.P. 56(c) provides that summary judgment will be granted if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The moving party bears the burden of demonstrating that there is clearly no genuine issue of fact and all doubts will be resolved against him. *Adickes v. Kress & Co.*, 398 U.S. 144, 157, 90 S.Ct. 1598, 1608, 26 L.Ed.2d 142 (1969); *Janek v. Celebrezze*, 336 F.2d 828, 834 (3d Cir.1964). Once a movant has supported his motion with affidavits or with other evidence as permitted under Fed.R.Civ.P. 56, the party opposing the motion must adduce "specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e).

In support of his motion, defendant contends that "statements made before a legislative body on a subject properly within its jurisdiction and with some relation to legitimate legislative business are absolutely privileged." Defendant's Brief at p. 6.

Plaintiff concedes that the absolute privilege noted above exists in the common law of many jurisdictions. We must first consider, however, whether we should apply an absolute privilege under federal or state common law. Only two cases have been published recently dealing with Congressional witness immunity. In the first, *Bio/Basics International Corp. v. Ortho Pharmaceutical Corp.*, 545 F.Supp. 1106 (S.D.N.Y.1982), the district judge thoroughly considered the various requirements for the creation of a federal common law and concluded that the issue of immunity was best determined under state law principles. In the other, *Webster v. Sun Company, Inc.*, 731 F.2d 1 (D.C.Cir.1984), neither the court of appeals nor the district court considered the issue of federal versus state common law. The district judge merely applied what she termed the common law immunity found in the Restatement (Second) of Torts § 590A. Because the court of appeals never questioned the choice made by the district court, *Webster* is uninstructive.

We note at this point the contention of *amicus curiae* that it is unnecessary for us to reach this choice of law issue because both New Jersey and federal common law provide essentially the same privilege. Although we agree with the substance of this contention, we believe it to be more appropriate to establish whether we are applying state or federal common law due to the unclear status of New Jersey's law of legislative witness immunity. *See Rogozinski v. Airstream By Angell,* 152, N.J.Super. 133, 149-50, 377 A.2d 807 (Law Div.1977).

Although there typically exists "no federal general common law," *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78, 58 S.Ct. 817, 822, 82 L.Ed. 1188 (1938), certain exceptions have been recognized. Such exceptions "fall into essentially two categories: those in which a federal rule of decision is 'necessary to protect uniquely federal interests,' and those in which Congress has given the courts the power to develop substantive law." *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640, 101 S.Ct. 2061, 2067, 68 L.Ed.2d 500 (1981) (citations omitted). It is clear that the instant issue of witness immunity

does not fall within the latter exception. *See id.* at 641, 101 S.Ct. at 2067; *Bio/Basics,* 545 F.Supp. at 1111. Although the question of whether this issue fits within the exception for the protection of uniquely federal interests is less clear, *see Webster,* 731 F.2d at 4, we believe that it does not. As in *Bio/Basics,* there are legitimate, yet conflicting policy interests involved in the granting of an absolute privilege for legislative witnesses. As a result, it is impossible to identify a single substantive federal policy that would be served by the creation of a particular substantive rule of federal common law. First of all, there is a distinct need for witnesses to testify without the fear of facing private defamation actions. By allowing an absolute privilege, the legislature will be aided in obtaining full and frank testimony. Conversely, it is essential to protect innocent third parties from misuse of the committee, and its immunity, by unscrupulous witnesses. These conflicting interests "require an independent policy determination for their resolution." *Bio/Basics,* 545 F.Supp. at 1113. Further, "[s]uch an independent policy determination is, absent a paramount federal interest in a uniform rule of law, not to be made by a federal district judge through the creation of federal common law." *Id. See also In re Agent Orange Product Liability Litigation,* 635 F.2d 987, 994-95 (2d Cir.1980), *cert. denied,* 454 U.S. 1128, 102 S.Ct.980, 71 L.Ed.2d 116 (1981). If a federal rule of law is necessary, we leave it to Congress to enact. Absent such legislation, we shall proceed in an unexceptional manner and apply the substantive laws of the individual states.

B

Having concluded that state law should supply the legal principle in this matter, we now consider whether it is the law of New Jersey, or of some other state, which controls. In deciding this question, we apply New Jersey's choice of law rules. *Klaxon Co. v. Stentor Electric Mfg. Co.,* 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941). New Jersey has adopted a conflict of law rule in tort cases whereby the courts look "to the law of the jurisdiction 'having the most significant relation-

ship and closest contacts with the occurrence and the parties.' " *Rohm and Haas Co. v. Adco Chemical Co.*, 689 F.2d 424, 429 (3rd Cir. 1982) (quoting *Rose v. Port of New York Authority*, 61 N.J. 129, 140, 293 A.2d 371 (1972)).

Although this may be a complicated matter in defamation cases, neither of the parties contends that any state's law other than New Jersey's should apply. Therefore, our consideration of this question shall be brief. We find that the application of New Jersey law is most appropriate due to the following factors: (1) the hearing at which defendant made his statement took place in Atlantic City, New Jersey; (2) each of the casinos mentioned in defendant's statement is located in Atlantic City, New Jersey; (3) defendant is a resident of New Jersey and is the Superintendent of the New Jersey State Police; (4) plaintiff, a citizen of Hong Kong, China, has visited Atlantic City casinos on a number of occasions; and (5) New Jersey has a very substantial interest in the regulation of Atlantic City's casinos and in ensuring that they remain free of the corruption inherent in any involvement with organized crime and the illegal drug trade. Clearly, these factors outweigh any interests which could be put forth relating to other states' policies. We turn now to a determination of the relevant New Jersey law.

C

In his brief supporting his motion, defendant urges this Court to adopt the privilege as it is defined in Restatement (Second) of Torts § 590A which reads as follows:

> Witness in Legislative Proceedings.
>
> A witness is absolutely privileged to publish defamatory matter as part of a legislative proceeding in which he is testifying or in communications preliminary to the proceeding, if the matter has some relation to the proceeding.

The comment to this section indicates that this privilege is similar in all respects to that granted to witnesses in judicial proceedings and that the comments to that section are applicable to § 590A as well.

It is well established that New Jersey has adopted the Restatement (Second) position relating to judicial immunities. *See Rainier's Dairies v. Raritan Valley Farms, Inc.*, 19 N.J. 552, 558, 117 A.2d 889 (1955). Thus, we shall consider the reasons for the adoption of the judicial immunity provision and determine their applicability to legislative hearings. Primary among these reasons is the necessity for full disclosure by witnesses in order to further the administration of justice. The identical reason exists in the present context because it is essential that the legislature be fully informed in order to enact appropriate legislation. *See Eastland v. United States Serviceman's Fund,* 421 U.S. 491, 95 S.Ct. 1813, 44 L.Ed. 324 (1975). Additionally, because of the potential for a judicial body to compel a witness to testify, the need for an absolute privilege becomes all the more necessary. It would be entirely unfair to require one to testify and, as a result, subject him or her to a private suit for defamation. Likewise, the United States House of Representatives has the authority to compel witness testimony thus causing the same potential hardship and resultant necessity for immunity.

Because of the compelling nature of the rationale supporting witness immunity in a judicial setting and the similarity of both the necessity and practicality of the immunity in the legislative setting, we anticipate that the New Jersey Supreme Court would adopt the absolute immunity for statements to legislative bodies being sought by defendant. Finally, we shall consider plaintiff's attempt to pierce this immunity and the factors relevant thereto.

IV

We find that in order to be absolutely privileged, a statement made to a legislative body must be (1) related to the subject matter (2) of legislative proceedings (3) which are either (a) being conducted or (b) being contemplated in good faith, and (4) which are within the jurisdiction of the legislative body conducting them.

Plaintiff contends that defendant has lost this absolute privilege because he voluntarily appeared at the hearing and

made the defamatory statement without being placed under oath. Moreover, plaintiff maintains that defendant's statement was not made in response to any specific question and bore no relation to the subject matter of the hearing. We note that none of these contentions raise factual issues which would render summary judgment inappropriate.

Even though the Subcommittee has the ability to compel testimony from witnesses, it is not necessary that a witness be subpoenaed in order to receive the protection of the privilege. *See* Restatement (Second) of Torts § 588, Comment c. *See also Webster,* 731 F.2d at 4 (unsolicited statements); *Bio/Basics,* 545 F.Supp. at 1108 (specific request that someone from Ortho testify). Were we to conclude that testimony was privileged only when compelled, we would impose a very significant burden upon both the legislature and potential witnesses. The instant case is factually similar to *Bio/Basics* where there was a specific request for testimony from Ortho Pharmaceutical but no individual was named in the informal request. *Id.* In the instant case, the Subcommittee initially invited Lt. Colonel J.J. Dintino, currently Deputy Superintendent of the State Police, to testify. Dintino informed defendant, his superior, of this request who then determined that he was the proper individual to appear at the hearing. (Pagano Affidavit ¶ 2). Therefore, plaintiff cannot contend that defendant's testimony was entirely unsolicited. Nevertheless, provided that all other relevant factors are satisfied, even unsolicited statements to a legislative body should be privileged. *See Webster,* 731 F.2d at 4.

We conclude, as well, that the fact that defendant was not under oath at the time he made his statement is not dispositive. *See* Restatement (Second) of Torts § 588, Comment b. It would be arbitrary and illogical to require that a witness be placed under oath in order to obtain the privilege while allowing his unsworn statements, communicated to the legislature prior to its hearing, to be privileged. Likewise, we find it irrelevant that defendant's statement was not made in response to a specific question. *Id.* at Comment c. Any potential for abuse caused by allowing witnesses to make statements prior to any questioning is countered by the relevancy requirement which is central to

the privilege itself. We note also that any abuse of the immunity by unsworn witnesses is likely to be tempered by their sincere desire to be recognized as knowledgeable and credible in their testimony. Such legitimate desires strongly support the allowance of the privilege despite the lack of an oath.

Finally, plaintiff contends that the statement made about him was "not relevant to the Subcommittee's inquiry and [that] such lack of relevancy was conceded when the Subcommittee granted" defendant's request that all reference to plaintiff be removed from the record. Plaintiff's brief at 1. As with the relevancy requirement in judicial immunity cases, the standard here is not of "technical legal relevancy, such as would, necessarily, justify insertion of the matter in a pleading or its admission into evidence, but rather *a general frame of reference and relationship to the subject matter of the action.*" *Fenning v. S.G. Holding Corp.*, 47 N.J.Super. 110, 118, 135 A.2d 346 (App.Div.1957) (emphasis added). The issue of relevance is one for the trial court's determination. *Id.* at 119, 135 A.2d 346. *Cf. Webster,* 731 F.2d at 5 ("So long as the statement has some objective pertinence to the legislative issue it was meant to address, it meets the [relevancy] . . . test."

Within the jurisdiction of the Subcommittee on Crime are the following areas: "Prevention of Crime, Drug Enforcement, Problems of Criminal Offenders, other appropriate matters as referred by the Chairman, and relevant oversight." Rule VI(a)(6), Rules of the Committee on the Judiciary. In furtherance of its obligation to investigate matters within its jurisdiction and to make legislative recommendations to the Judiciary Committee, the Subcommittee held the February 10, 1984 hearing in Atlantic City, New Jersey. The subject matter of the Subcommittee's inquiry is best summarized in the opening statement of Subcommittee Chairman Hughes which, in pertinent part, follows."[4]

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4. The United States Supreme Court has used the opening statement of the Committee chairman as a guide in determining the subject of the hearing inquiry. *See Hutcheson v. United States,* 369 U.S. 599, 601-603, 82 S.Ct. 1005, 1006-1007, 8 L.Ed.2d 137 (1962).

In addition to Chairman Hughes' opening statement, *amicus curiae* has provided us with a report on the *Money Laundering Penalties Act*

The subcommittee on crime this morning is examining a situation that is of great importance not only to the people of New Jersey, but this country: the alleged use of our casinos by elements of organized crime and drug traffickers to launder the profits of their crimes.

To understand what this hearing is about, it is important to realize a crucial fact about drug trafficking and organized crime. The enormous volume of money generated by these criminal enterprises cannot simply be pocketed by the criminals. The money seems to come in faster than it can be spent. Spending large sums of cash by persons such as drug traffickers, who are without any visible means of support, often generates suspicion.

The goal of every major criminal is to create an ostensibly legitimate source for the wealth they are acquiring and spending, and to invest the proceeds in legitimate as well as illegitimate enterprises. This is the essential objective of money laundering and its importance has been recognized by organized crime experts for decades.

The regulations of the Treasury Department do not place upon casinos the responsibility of reporting these transactions of more than $10,000. Over the last year, however, the Treasury Department has been studying this exemption, and discussing ways to end it. . . .

This hearing is designed to look into the problem of money laundering through casinos, and how best it can be solved. We want to know what the impact is on New Jersey and the Nation of the availability of the casinos for organized crime figures and/or traffickers to use to launder their cash. We want to know what the Treasury

---

of 1984, H.R.Rept. No.984, 98th Cong., 2d Sess., Part 1 (1984), wherein the Judiciary Committee identified the subject of the Atlantic City Hearing:

> the Committee has investigated the problems of the *significant volume of currency transactions at gaming casinos* (which are not currently subject to the reporting requirements) *involving the proceeds of drug trafficking* and other criminal activity.

Id. at 3. (emphasis added).

> Department, after a year of study, is going to propose that will close the money laundering loophole that the reporting exemption for casinos has created. We want to know what the effect upon the casino industry might be if the reporting requirements are implemented. . . .

Hearings before the Subcommittee on Crime of the House Committee on the Judiciary, 98th Cong.2d Sess. 1-4 (1984).

There can be little doubt, after reading this opening statement, that defendant's remarks were relevant to the subject matter of the hearing. The Subcommittee met to consider the use of casinos by members of organized crime and drug traffickers as a means to launder their profits. In commencing his testimony, defendant read a brief statement wherein he related instances where a dozen individuals, including plaintiff, deposited cash in various Atlantic City casinos with the purpose of laundering it. Defendant also identified each of these individuals as either a member of organized crime or a narcotics trafficker. Such specific examples of money laundering are entirely within the subject of the subcommittee's inquiry and are, thus, absolutely privileged.

Plaintiff, not surprisingly, maintains that the statement concerning him was irrelevant which, he contends, was conceded when it was removed from the hearing record at defendant's request. We disagree. Defendant sought to have all reference to plaintiff stricken from the record in response to plaintiff's request and in an attempt to obtain a general release from liability. These are legitimate tactical reasons for removal which, given the cumulative nature of defendant's statement relating the activities of eleven other individuals, do nothing to detract from the statement's relevance to the Subcommittee's hearing.

When asked at oral argument whether defendant's statement would be relevant if true, plaintiff's counsel maintained that the Court's question was irrelevant because Pagano's statement was, in fact, false. Counsel has missed the point of the question and the import of the absolute privilege. Certainly,

where an absolute privilege is claimed, the truth or falsity of a statement is immaterial. If truth were the only factor which made a statement relevant, and thus within the ambit of the privilege, there would be no need for the privilege at all as, in most instances, truth is a complete defense to a defamation action. *See* W. Prosser, Law of Torts § 116 at 797 (4th Ed.1971). The central principle of the privilege is to *tolerate* defamatory remarks in order to further interests which are, on balance, of greater importance to the overall legislative, or judicial, design than are those interests which would favor the imposition of liability.

We conclude that Col. Pagano's statement pertaining to Hon Yip related to the subject matter of the legislative proceedings being conducted in Atlantic City, New Jersey and that these proceedings were well within the jurisdiction of the House Subcommittee on Crime. We are aware that summary judgment is an extraordinary remedy which is granted only infrequently by the courts. However, in a case such as this, where there are no factual issues in dispute and a solely legal issue is presented for disposition, summary judgment is appropriate. Defendant's motion shall be granted.

The Court shall enter an appropriate order.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 84-3066

HON YIP a/k/a YIP HON,

Plaintiff,

—v.—

CLINTON L. PAGANO,

Defendant.

This matter having come before the Court on the motion of defendant, CLINTON L. PAGANO, for summary judgment pursuant to Fed. R. Civ. P. 56(b); and

On the motion of the LEADERSHIP GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES to appear as *amicus curiae*; and

For the reasons stated in the Court's opinion filed this date:

It is on this 26th day of April, 1985 ORDERED that defendant's motion be and hereby granted.

It is further ORDERED that the motion of the LEADERSHIP GROUP be and hereby is granted.

/s/ MITCHELL H. COHEN

Mitchell H. Cohen, *Senior Judge*
United States District Court

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 85-5347

HON YIP, known as YIP HON

—vs.—

CLINTON L. PAGANO

HON YIP,

Appellant.

SUR PETITION FOR REHEARING

Present: ALDISERT, *Chief Judge,* SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, *Circuit Judges,*

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

/s/ CAROL LOS MANSMANN
Carol Los Mansmann
Circuit Judge

Date: February 5, 1986

Supreme Court, U.S.
FILED
MAY 1 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1621 (2)

In The

Supreme Court of the United States

October Term, 1985

HON YIP known as YIP HON,

Petitioner,

v.

CLINTON L. PAGANO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI ON BEHALF OF RESPONDENT CLINTON L. PAGANO

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20 pp

QUESTIONS PRESENTED

Did the Court of Appeals for the Third Circuit properly affirm the District Court's holding that respondent was absolutely privileged to issue defamatory statements if the statements were made before a congressional subcommittee and if the statements were relevant to the legitimate legislative business of the subcommittee?

A. Does state or federal law control the question of whether there is a judicial remedy for injury resulting from allegedly defamatory statements made during a congressional subcommittee hearing?

B. Assuming state law applies, should this Court grant a writ of certiorari to review the decision of the court below holding that New Jersey law granted respondent an absolute privilege to publish the allegedly defamatory matter as part of a congressional subcommittee hearing in which he testified?

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No. 85-1621

In The

Supreme Court of the United States

October Term, 1985

HON YIP known as YIP HON,

Petitioner,

v.

CLINTON L. PAGANO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI ON BEHALF OF RESPONDENT CLINTON L. PAGANO

BRIEF IN OPPOSITION

Respondent, Clinton L. Pagano, respectfully requests that this Court deny the Petition for A Writ of Certiorari seeking to review the decision of the Court of Appeals for the Third Circuit entered in this case on January 16, 1986, petitioner's request for rehearing having been denied on February 5, 1986.

COUNTERSTATEMENT OF THE CASE

On February 10, 1984, Colonel Clinton L. Pagano, Superintendent of New Jersey State Police, testified from a prepared statement at a hearing of the Subcommittee on Crime of the United States House of Representative's Committee on the Judiciary. The Subcommittee was then conducting "a hearing in Atlantic City, New Jersey concerning the alleged use of casinos to launder profits realized by alleged organized crime members and drug traffickers." *Yip v. Pagano*, 606 *F. Supp.* 1566, 1567 (D.C.N.J. 1986).

Colonel Pagano prepared and submitted a statement to the Subcommittee in advance of the hearing in which he wrote:

> Yip Hon, an international narcotics smuggler from Hong Kong, China, deposited $110,000 in cash at the Golden Nugget Casino and $280,000 at Ceasar's Casino.

When delivering his statement orally to the Subcommittee, Colonel Pagano inserted the word "alleged" before the words "international narcotics smuggler." *Ibid.* Yip Hon was only one of twelve individuals specifically named by Colonel Pagano to vividly demonstrate that New Jersey's casinos are being used to launder illicitly acquired money. Although specifically invited to testify by the Subcommittees, Colonel Pagano was not subpoenaed. Moreover, the Subcommittee did not request or even suggest that he testify under oath. Colonel Pagano's testimony was immediately preceded by Attorney General Irwin I. Kimmelman's testimony and was followed by testimony from Thomas R. O'Brien, Director, Division of Gaming En-

forcement for New Jersey. These individuals were welcomed at the hearing by Honorable William J. Hughes, Congressman from New Jersey and Chairman of the Subcommittee as New Jersey's top law enforcement officers who were invited to inform the Subcommittee on "the nature and extent of money laundering in casinos." Neither Kimmelman nor O'Brien were subpoenaed or sworn prior to their testimony. Subsequent to the hearing, at the request of Yip Hon, Colonel Pagano asked that all references to Yip Hon be deleted from his written and oral testimony presented to the Subcommittee. No reasons were specified for that request and no conclusions can be drawn from that action. *Id.* at 1573.

On July 26, 1984 Petitioner, Yip Hon, filed this action in federal district court against Colonel Pagano charging that the February 10th statement, as it related to Yip Hon, was false and defamatory, was made recklessly and carelessly without regard to the truth and that Colonel Pagano had been motivated by malice. Jurisdiction in the United States District Court was based exclusively on diversity. No federal cause of action was asserted.

Colonel Pagano moved for summary judgment pursuant to *Fed. R. Civ. P.* 56(c) which the District Court granted after finding that there were no factual issues in dispute and that Colonel Pagano was entitled to a judgment as a matter of law. *Id.* at 1573. The District Court concluded that the issue of respondent's immunity from liability for defamatory statements was governed by state, not federal, common law. Although the law of immunity of a witness in a legislative proceeding has not been squarely addressed by New Jersey's courts, the District

Court held that New Jersey would adopt § 590A of the *Restatement (Second) of Torts* which provides a witness in a legislative proceeding with the same immunity as that granted to witnesses in judicial proceedings. *Id.* at 1570-71. That section of the *Restatement* provides:

> A witness is absolutely privileged to publish defamatory matter as part of a legislative proceeding in which he is testifying or in communications preliminary to the proceeding, if the matter has some relation to the proceeding.

Applying that doctrine to the facts in the case before it, the District Court found that Colonel Pagano's absolute privilege would not be pierced even though he had not been subpoenaed, did not testify under oath and was not responding to any specific question. *Id.* at 1571.

Yip Hon appealed the decision of the District Court to the Third Circuit. He asked the court to review the District Court's holding that Colonel Pagano was absolutely privileged to issue defamatory statements before a congressional subcommittee when these statements were made maliciously, recklessly and carelessly, and without regard to the truth. He secondly asked the court to decide whether, assuming the absence of malice, the defense of privilege should apply when the witness had not been subpoenaed and the statements were false. He did not appeal the holding that the issue was governed by state law. Without written opinion, the Third Circuit affirmed the decision of the District Court for the reasons set forth in the District Court opinion. 782 *F.*2d 1033 (3rd Cir. 1986). The request for rehearing in banc was denied on February 5, 1986.

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REASONS WHY THE PETITION SHOULD BE DENIED

THE WRIT SOUGHT HERE SHOULD BE DENIED BECAUSE THE COURT BELOW CORRECTLY HELD THAT STATE LAW CONTROLLED THE ISSUE PRESENTED AND CORRECTLY FOUND THAT UNDER NEW JERSEY LAW RESPONDENT'S TESTIMONY BEFORE THE CONGRESSIONAL SUBCOMMITTEE WAS ABSOLUTELY PRIVILEGED.

Yip Hon asks this Court to grant a writ of certiorari to decide whether an individual should be absolutely immune from liability for damages resulting from defamatory statements made before a congressional subcommittee under the particular circumstances alleged in this matter. Only secondly does Yip Hon ask this Court to decide whether a state or federal rule of decision should have been applied.

Before beginning to resolve a case, a federal court must clearly establish whether state or federal law will supply the rule of decision. In this case, the District Court held that state law controlled the issues before it. Yip Hon did not specifically appeal that holding to the Court of Appeals for the Third Circuit.*

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* Yip Hon presented his arguments to the Third Circuit Court of Appeals as follows:

I. Although his false defamatory statements were made to a Congressional Subcommittee, defendant Pagano is not shielded from civil liability for libel and slander because his defamatory statements were made maliciously, recklessly, carelessly, and without regard to the truth.

II. Additionally, even in the absence of malice, defendant Pagano is not shielded from liability for libel and slan-

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Rather, he argued that an individual who testified before a congressional subcommittee, but was not subpoenaed, was not sworn and who did not meet certain other characteristics should not be afforded absolutely immunity from defamation actions.

Thus, it could be argued that petitioner now has no right to present to this Court the question of whether state or federal law should apply the rule of decision. Nevertheless, respondent will first address this question and will demonstrate conclusively that state law must provide the rule of decision. Once that result is established, it will be readily apparent that the application of state law to this particular set of facts does not require or justify complete review by this Court pursuant to a writ of certiorari.

In his complaint filed with the District Court on July 26, 1984, Yip Hon alleged that Colonel Pagano's statement, as it referred to him was false and defamatory, was not made in response to any specific question addressed to defendant, was not pertinent, material or relevant to the hearing, that defendant knew or could have known with the exercise of reasonable care that the statement was false, that the statement was made recklessly and carelessly without regard to the truth, that defendant was motivated by malice and that defendant refused to retract his statement. Although he pled with specificity the manner in which his reputation had been damaged, Yip Hon

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der because his false statements were made under circumstances lacking the safeguards of supervision and control attendant upon judicial proceeding [Petitioner's brief at i, ii].

actually presented a simple cause of action based on the law of defamation. Jurisdiction was premised exclusively on diversity of citizenship; Yip Hon is a citizen of Hong Kong, China and Colonel Pagano is a citizen of New Jersey.

Yip Hon asserted only state tort law claims and did not allege any injury to any federally created or protected interests. It has been clear since 1938 that in diversity actions, "(e)xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State." *Erie R. Co. v. Tompkins,* 304 *U.S.* 64, 78 (1938). It is equally clear that "a federal court adjudicating a state-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the State" and must apply the law of the State to the matter before it. *Guaranty Trust Co. v. York,* 326 *U.S.* 99, 108 (1945).

The law of defamation is a state-created tort law which imposes liability on those who publish false matters which injure the reputation of another. *Maressa v. New Jersey Monthly,* 89 *N.J.* 176, 445 *A.*2d 376, *cert.* denied 459 *U.S.* 907 (1982). This Court has made it very plain that one's interest in his reputation is merely one of a number of personal interests "which the *State* may protect against injury by virtue of its tort law, providing a forum for vindication of those interests by means of damage actions." *Paul v. Davis,* 424 *U.S.* 693, 712 reh'g denied (1976) (emphasis added). An individual has no constitutionally protected liberty or property interest in his reputation alone. *Ibid.* Nor does an individual have any congressionally protected interest in his reputation alone. Accordingly, in a case such as this one, where only a state-created cause

of action for defamation has been alleged, state law provides the rule of decision to be applied by a state or federal court, whichever forum has been selected by the plaintiff. See *Thompson v. Curtis Publishing Co.*, 193 *F.*2d 953 (3rd Cir. 1952) which held that state law controlled the question of whether an action for defamation survived the death of plaintiff's intestate.

Because the protection of one's interest in his reputation is solely a matter of state law, generally "the existence of a judicial remedy for injury to reputations is entirely a matter of state law." *Maressa v. New Jersey Monthly, supra,* 89 *N.J.* at 190. The State may limit, modify or even remove through the operation of testimonial privilege the state-created remedy for injury resulting from defamation. *Mazzella v. Philadelphia Newspapers, Inc.*, 479 *F. Supp.* 523 (E.D.N.Y. 1979). Federal law may also *limit* the extent of the remedy for such injuries. A state may not grant a remedy for defamation injuries when the publication of the defamatory statement is otherwise protected by the United States Constitution. In *New York Times Co. v. Sullivan,* 376 *U.S.* 254 (1964), this Court found that state law could not impose liability on the news media for statements protected by the freedom of speech and press clause of the First Amendment. That holding was further refined in *Gertz v. Welch,* 418 *U.S.* 323 (1974). See also *McDonald v. Smith,* 472 *U.S.* —, 105 *S.Ct.* 2787 (1985) which defines the scope of the protection provided by the right to petition clause of the First Amendment and *Burke v. Deiner,* 97 *N.J.* 465, 479 *A.*2d 393 (1984) which holds that the First Amendment also limits the liability of public officials for defamation to injuries resulting from certain statements made with actual malice.

Thus, it is clear that the federal courts will *prohibit* a state from providing a remedy for defamation when to do so would encroach on the exercise of activities protected by the First Amendment. However, no federal court can expand the protection against damage to ones' reputation provided by state law and "afford recovery if the right to recover is made unavailable by the State," in the absence of a showing that a federally protected interest has been damaged by the defamatory statement. *Guaranty Trust Co. v. York, supra,* 326 *U.S.* at 108-109. Where state law qualifies or abridges a cause of action, the federal courts must do likewise. *Ragan v. Merchants Transfer & Warehouse Co.,* 337 *U.S.* 530, 533, reh'g denied 338 *U.S.* 839 (1949).

The purpose of diversity jurisdiction is not to provide a litigant with an alternative forum to the state courts so that he might find a remedy for his state-created cause of action which is more to his advantage. Rather, it is to provide a forum where a litigant may be assured of a decision which accurately reflects state law free from local bias. *Guaranty Trust Co. v. York, supra,* 326 *U.S.* at 111. It must be remembered that the theory of diversity cases is that "the rights enjoyed under local law should not vary because enforcement of those rights was sought in the federal court rather than in the state court." *Ragan v. Merchants Transfer Warehouse Co., supra,* 337 *U.S.* at 532. Similarly, it must be carefully noted that "(i)f recovery could not be had in the state court, it should be denied in the federal court." *Ibid.* Even when the highest court in the state has not decided the precise point in question, the federal courts are not free to choose their

own rules of decision. *West v. American Telephone & Telegraph Co.*, 311 *U.S.* 223, 236 (1940). Nor may a federal court decline to decide questions of state law when state law is unsettled and it is difficult to ascertain what the state courts may thereafter determine. *Meredith v. Winter Haven*, 320 *U.S.* 228, 234 (1943). State law must be determined "from all the available data" and must be applied by a federal court. *West v. American Telephone Telegraph Co., supra*, 311 *U.S.* at 237. An alternative rule may not be applied by a federal court, "however superior it may appear from the viewpoint of 'general law.'" *Ibid.*

Yip Hon's stated reasons for seeking the writ ignore the fact that his is a diversity action in which state law must be applied and imply that *in this* instance the federal courts should define the tort liability for Colonel Pagano's testimony before the congressional Subcommittee. He suggests that either this Court should create federal common law limiting the privilege afforded a witness before Congress to a qualified one or should find that, as a matter of federal common law, when an unsubpoenaed, unsworn individual speaks before a congressional body, he is not a "witness" but is simply a petitioner of the government within the meaning of *McDonald v. Smith, supra.*

In his articulate opinion for the District Court, Senior Judge Milton H. Cohen clearly found that state law controls the limits of Yip Hon's remedy for the allegedly defamatory statement of Colonel Pagano. *Yip v. Pagano, supra*, 606 *F. Supp.* at 1570. Yip Hon has presented this Court with no justification for overturning the entire history of the law of defamation in this matter. There is absolutely no basis for a finding by a federal court that, in this instance alone, federal common law creates a rem-

edy for defamation greater than that provided by state law.

"Federal courts, unlike state courts, are not general common-law courts and do not possess a general power to develop and apply their own rules of decision." *Milwaukee v. Illinois,* 451 *U.S.* 304, 312 (1981). The federal court's authority to create a federal common law is strictly limited to two situations: "those in which a federal rule of decision is 'necessary to protect uniquely federal interests,' . . . and those in which Congress has given the courts the power to develop substantive law . . . ." *Texas Industries v. Radcliffe Materials,* 451 *U.S.* 630, 640 (1981), (citations omitted). Petitioner here urges that there are uniquely federal interests which warrant creation of a federal common law remedy for his injuries. However, he fails to recognize that the doctrine requires that a federal rule of decision must be *necessary* to protect the federal interest because of a significant conflict between the federal interest and the use of state law as the rule of decision. *Milwaukee v. Illinois, supra,* 451 *U.S.* at 313; *Bio/Basics International v. Ortho Pharmaceutical Corp.,* 545 *F. Supp.* 1106 (S.D. N.Y. 1982).

In this case, there is no conflict. The federal interest in issue is plainly Congress' interest in conducting thorough and probing investigations which requires a forum where its witnesses will be able to testify freely without the fear of being subjected to a private suit for defamation. *Yip v. Pagano, supra,* 606 *F. Supp.* at 1571. This "unique federal interest" could not possibly justify a finding by this Court that the privilege provided legislative witnesses in state law should be limited by this Court. To the contrary, absolute privilege *must* be afforded legislative wit-

nesses in order to protect the unique federal interest involved. State law fully protects the federal interest. In contrast, the unique federal interest would not be protected by the rule suggested by petitioner. Even where a federal interest as concrete as the status of the United States Government as a creditor is at stake, a federal court cannot find a rule of decision in the "general law" when Congress has not acted and where "there exists a flexible body of pertinent state law continuously being adapted to changing circumstances. . . ." *Commissioner v. Stern*, 357 *U.S.* 39, 45 (1958).

Petitioner's stated reasons for seeking the writ fail to address the real issue of whether a federal court should or could expand the remedy for defamation provided by New Jersey common law. Petitioner does not assert that the District Court improperly defined New Jersey law governing privilege of a witness in legislative proceedings. He appears to concede that § 590A of the Restatement (Second) of Torts correctly states New Jersey law. Rather, he implies that the District Court incorrectly applied state law or failed to create federal common law when it found that Colonel Pagano was a "witness in a legislative proceeding" and, instead, Colonel Pagano should have been characterized as an individual petitioning the government. In that status, Yip Hon appears to argue, Colonel Pagano would only have a qualified privilege to publish defamatory remarks under New Jersey or federal law citing *McDonald v. Smith, supra,* and *Burke v. Deiner, supra,* in support of his position.*

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* Petitioner has misconstrued the impact of *McDonald v. Smith, supra,* and *Burke v. Deiner, supra.* These cases do not expand

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New Jersey's Supreme Court has not had an occasion to address, or finally resolve, the issues presented. Nevertheless, as discussed above, Judge Cohen clearly found that § 590A of the *Restatement (Second) of Torts* properly defines the privilege of a witness in a legislative proceeding that would be applied under New Jersey law. He specifically found that New Jersey law would require that:

> in order to be absolutely privileged, a statement made to a legislative body must be (1) related to the subject matter (2) of legislative proceedings (3) which are either (a) being conducted or (b) being contemplated in good faith, and (4) which are within the jurisdiction of the legislative body conducting them. [*Yip v. Pagano, supra,* at 157].

Moreover, this privilege would not be pierced even if the witness had not been subpoenaed, did not testify under oath and did not make his statement in response to a specific question. *Id.* Then, applying the facts assumed to be true for purposes of summary judgment, Judge Cohen found that, under New Jersey law Colonel Pagano was a witness before a legislative body within the meaning of *Restatement (Second) of Torts,* § 590A; that he was more than a mere petitioner of the government.

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the remedy for defamation otherwise created by the State. Rather, they hold that a state cannot create a judicial remedy for defamation when to do so would interfere with an individual's right to petition the government. In other words, *McDonald* and *Burke* hold that the Constitution *protects* individuals from liability for defamatory statements made when petitioning the government; they do not hold that the individual defamed is entitled to a greater remedy than would otherwise be available under the state tort law.

The reasons presented by Yip Hon are not the type of "special and important reasons" for granting a writ contemplated by Rule 17 of the Supreme Court. Yip Hon has presented no reason for this Court to break with its tradition of denying a writ of certiorari when to grant the writ would result in a simple review a Court of Appeals' determination of state law. *Haring v. Prosise,* 462 *U.S.* 306, 314 n.8 (1983), quoting *Bishop v. Wood,* 426 *U.S.* 341, 346 (1976). The denial of the writ is particularly appropriate in instances such as this where the Court of Appeals has had to determine state law without the benefit of a decision on point from the highest court in the state. *Huddleston v. Dwyer,* 322 *U.S.* 232, 237 (1944). In this case, the District Court properly determined and applied state law from "all available data." The Court of Appeals, in its affirmance of the District Court, fulfilled its obligation to reach a reasonable construction of New Jersey law and apply it to the facts of this case.

The decision below was properly decided as a matter of state law and should not be reviewed here. Petitioner filed a diversity action claiming injury from defamation. The right to a remedy for injury to one's reputation is a state created right and its limits are likewise determined by state law. Petitioner has not asserted any injury to a federally protected right or postulated a uniquely federal interest which can only be protected by the adoption of a federal rule of decision. Review by this Court would simply be a review of the application of a state law decision to a particular set of facts. Such a matter is most certainly not a "special and important reason" for granting the writ as contemplated by Rule 17 of the Supreme Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 85-1621

IN THE

Supreme Court of the United States

OCTOBER TERM 1985

HON YIP Known as YIP HON,

Petitioner,

—v.—

CLINTON L. PAGANO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Respondent opposes the granting of certiorari on one ground only. He argues that State law, not Federal law, determines whether one who made a statement to a Congressional Subcommittee has an absolute privilege to defame.

However, Federal law should be applied to determine whether or not to accord privilege. This is because uniquely Federal interests are involved, particularly with respect to the effective functioning of the Congress. If it were otherwise, the granting of privilege would be uncertain and left to the vagaries of the laws of the several States. It would lead to great diversity in results.

Respondent's argument that State law governs is based on this being a diversity case. Respondent is in error.

It is the source of the right sued on, and not the basis of Federal jurisdiction, which determines the law governing a

particular case. The source of the right sued on was the Congressional Subcommittee Hearing. The defense of absolute privilege was claimed because the statements were made at such Congressional Hearing. The circumstances under which the statements were made determine the issue of whether the absolute privilege is to be accorded.

Thus, the source of the right and the circumstances under which the defamatory statements were made, require determination of the issue under Federal law.

Although Respondent now argues that State law should control, it is the Respondent who, in his answer to the complaint, alleged as an affirmative defense:

> "All relevant statements were made by defendant during the course of official proceedings of the House of Representatives' Subcommittee on Crime of the Committee on the Judiciary and are therefore absolutely privileged * * *." (Record pages 32-33)

This, no doubt, prompted the Congressional Leadership Group of the United States House of Representatives to move for leave to appear as *amicus curiae.* In its motion of January 25, 1985 to the District Court for leave to appear, the Congressional Group stated that Respondent had appeared before the Congressional Subcommittee where he made the defamatory statements which are the subject of the action. In support of its motion, the Congressional Group wrote:

> "The Court's ruling may have a significant effect on the legal principles governing Congressional witnesses."

Subsequently, in its brief to the Third Circuit Court of Appeals, the Congressional Group stated:

> "Because of the paramount federal interest in Congress's obtaining information, the absolute privilege of Congressional witnesses should be a matter of federal law * * *." (Brief of Congressional Group dated September 3, 1985, page 7, note 8).

An additional factor demonstrating the need for the application of Federal law is that "Committees of the House of Representatives hold more than three thousand hearings a year." (Brief of Congressional Group dated September 3, 1985 at page 16). This, too, should be considered by the Court.

Respondent, at page 4 of his brief, states that Petitioner "did not appeal the holding that the issue was governed by state law." Respondent is in error. Petitioner did not appeal from that part of the judgment of the District Court which granted leave to the Congressional Group to appear. Petitioner did appeal from the balance of the judgment which dismissed his complaint and thus brought up for review all issues decided by the District Court and which are the bases of the petition for the writ of certiorari.

CONCLUSION

The importance and substantiality of the questions presented have not been denied. The need for plenary review is indisputable. The petition for a writ of certiorari should be granted.

Dated: New York, New York
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Respectfully submitted,

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